

BEFORE THE BOARD OF REGISTRATION

COUNTY OF MAUI

STATE OF HAWAII

MICHAEL P. DUPREE,

Appellant,

vs.

ROY T. HIRAGA, Clerk of the
County of Maui, and SOLOMON P.
KAHO'OHALAHALA,

Appellees.

) CASE NO. BOR-08-01
) (Administrative Appeal)
)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION; EXHIBIT "A"

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION

By letter dated October 16, 2008, that was received by the Board of Registration for the County of Maui ("Board") on October 20, 2008, Mr. Michael Phoenix Dupree ("Dupree") filed an appeal of the decision of the City Clerk for the County of Maui dated October 10, 2008, that Solomon P. Kaho'ohalahala is a registered voter in (Lanai) District/Precinct 13/07. A hearing was held on October 31, 2008, before the Board. At the hearing, Appellant Mr. Dupree appeared pro se, Lance D. Collins, Esq. appeared as counsel for Appellee Solomon P. Kaho'ohalahala, who was present at the hearing, and Deputy Corporation Counsel Jane E. Lovell appeared as counsel for Roy T. Hiraga, the County Clerk for Maui, who was present at the hearing.

The Board, having heard and considered the evidence adduced at the hearing and, based on the credible evidence and good cause appearing therefore, hereby makes the following Findings of Fact and Conclusions of Law and Decision.

FINDINGS OF FACT

Mr. Dupree's Complaint to the County Clerk

1. If it should be determined that any of these Findings of Fact should have been set forth herein as Conclusions of Law, the Board so concludes as to such findings.
2. Mr. Kaho'ohalahala is a candidate for the Maui County Council for the seat designated for the resident of the Island of Lana'i for the 2008 general election.
3. By letter received September 29, 2008, Mr. Phoenix Dupree, also known as Michael Phoenix Dupree, also known as Phoenix, a registered voter of the State of Hawai'i, filed a challenge of Mr. Kaho'ohalahala's right to be or to remain registered as a voter of the Lanai District/Precinct 13/07.
4. Mr. Dupree contends that while Mr. Kaho'ohalahala is from Lanai and has family on Lana'i, he in fact is not a resident of Lana'i.
5. Based primarily on Mr. Kaho'ohalahala's stated intention of establishing his residence in Lana'i City, with the intention of making it his permanent dwelling place, the County

Clerk concluded that "with the exception of the period from July 2006 to July 2008, Mr. Kaho'ohalahala's residence address of record has always been on Lana'i." Accordingly, the County Clerk determined that Mr. Dupree's challenge was not sustained.

Mr. Dupree's Appeal to the Board of Registration

6. By letter dated October 16, 2008, that was received by the Board on October 20, 2008, Mr. Dupree appeals the County Clerk's decision that Solomon P. Kaho'ohalahala is a registered voter in (Lana'i) District/Precinct 13/07.

7. Up until July 10, 2006, Mr. Kaho'ohalahala resided at 533 Akolu Place, Lana'i City, Lana'i, Hawai'i 96763.

8. On or about July 10, 2006, Mr. Kaho'ohalahala changed his residence from Lana'i to 124-A Fleming Road, Lahaina, Maui, Hawai'i 96761.

9. On or about July 15, 2008, Mr. Kaho'ohalahala changed his residence address to 444 Fraser Avenue, Lana'i City, Lana'i, Hawai'i 96763, where his brother and his brother's family reside.

10. Mr. Kaho'ohalahala is employed by the Research Corporation of the University of Hawai'i as an instructor/facilitator at Maui Community College, at its campus in Wailuku, Maui, Hawai'i.

11. Mr. Kaho'ohalahala is married to Lynn Kaho'ohalahala, who is a vice principal at Lahainaluna High School, in Lahaina, Maui, Hawai'i.

12. While originally from Lana'i, and while his brother continues to live on Lana'i, Mr. Kaho'ohalahala does not own or work for a business on Lana'i, nor does he own or rent a house or keep a car on Lana'i.

13. Mr. Dupree has lived on Lana'i since 1991 and is currently employed as the general manager of the Blue Ginger Café. He presented Mr. Ron McComber, a resident of Lana'i, as a witness who testified that he has not seen Mr. Kaho'ohalahala on Lana'i.

14. Since July 2008 (when Mr. Kaho'ohalahala claims that he moved back to Lana'i), Mr. Dupree has not seen Mr. Kaho'ohalohalo at the post office, either bank, the Lana'i store, the gas station, or any restaurant on Lana'i.

15. The County Clerk received letters from eleven other residents of Lana'i disputing Mr. Kaho'ohalahala's Lana'i residency.

16. In support of his claim of residency on the island of Lana'i, Mr. Kaho'ohalahala submitted his affidavit in which he states that he "was born and raised on the island of Lana'i and retained [his] residence on Lana'i except for a brief period in

which [he] was in the service of the State of Hawai'i with the Kaho'olawe Island Reserve Commission."¹

17. Mr. Kaho'ohalahala further states that his family has continuously lived on the island of Lana'i throughout his life and that it is his understanding that he is a legal resident of Lana'i because of his permanent residence address is, and was at the time he filed his nomination papers, 444 Fraser Avenue, Lana'i City.

18. Mr. Kaho'ohalahala's brother, Gaylien, also submitted an affidavit in which he states that Mr. Kaho'ohalahala talked with him about returning to Lana'i to live and that Mr. Kaho'ohalahala has resided at 444 Frazer Avenue since beginning of July, 2008.

19. Other than Mr. Kaho'ohalahala's self-proclaimed intention, which was corroborated by his brother, and a witness testifying as to his veracity, no evidence was presented regarding his abandonment of his residency in Lahaina and his permanent relocation to Lana'i.

CONCLUSIONS OF LAW

1. If it should be determined that any of these Conclusions of Law should have been set forth herein as Findings of Fact, the Board so finds as to such conclusions.

The County Clerk concluded that Mr. Kaho'ohalahala "did not lose his residency due to his absence from Lanai while he was employed in the service of the State", however, Mr. Kaho'ohalahala legally changed his residency from Lanai to Lahaina on July 10, 2006.

2. The Board has jurisdiction over the parties herein and the subject matter of this appeal.

3. Appellant Michael P. Dupree has standing to bring this appeal of County Clerk Roy T. Hiraga's decision regarding Mr. Dupree's challenge to Solomon P. Kaho'ohalahala's residency for election purposes. Haw. Rev. Stat. § 11-25 ("Any registered voter may challenge the right of a person to be or to remain registered as a voter in any precinct for any cause not previously decided by the board of registration or the supreme court in respect to the same person[.]")

4. Pursuant to the Maui County Charter Section 3-1, the Council shall be composed of nine members elected at large, and as it pertains to this case, one of whom shall be a resident of the island of Lana'i.

5. Pursuant to Maui County Charter Section 3-3, to be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of the filing of nomination papers, a resident in the area from which the person seeks to be elected.

6. Pursuant to Haw. Rev. Stat. § 11-13(1), for election purposes, Mr. Kaho'ohalahala's residence is that place in which

his habitation is fixed, and to which, whenever he is absent, he intends to return.

7. Pursuant to Haw. Rev. Stat. § 11-13(2), "[a] person does not gain residency in any precinct into which the person comes without the present intention of establishing the person's permanent dwelling place within such precinct."

8. Pursuant to Haw. Rev. Stat. § 11-13(3), "[i]f a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than that with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place."

9. Pursuant to Haw. Rev. Stat. § 11-13(4), "[t]he mere intention to acquire a new residence without physical presence at such place, does not establish residency, neither does mere physical presence without the concurrent present intention to establish such place as the person's residence."

10. Pursuant to Haw. Rev. Stat. § 11-13(5), "[a] person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison."

11. A rational, sensible, and practicable interpretation of a statute is preferred to one which is unreasonable or impracticable, inasmuch as the legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality. Morgan v. Planning Department, County of Kauai, 104 Hawai'i 173, 86 P.3d 982 (2004).

12. In order to relinquish one's domicile or residence there must be an intent to remain permanently at the new place where one is physically present and to simultaneously abandon the previously permanent place of abode. Acquisition of the new domicile must have been completed and the animus to remain in the new location fixed, before the former domicile can be considered lost. See Akata v. Brownell, 125 F.Supp. 6 (D. Hawaii 1954); Powell v. Powell, 40 Haw. 625 (1954); Anderson v. Anderson, 38 Haw. 261 (1948); Zumwalt v. Zumwalt, 23 Haw. 376 (1916). Residence is not lost by a temporary absence nor by maintaining of a temporary home elsewhere. Hurley v. Knudsen, 30 Haw. 887 (1929).

13. The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion by a preponderance of the evidence. Haw. Rev. Stat. § 91-10(5); Haw. Admin. R. § 2-51-43(h).

14. Mr. Dupree, as the person initiating the proceeding, presented sufficient credible evidence to prove by a preponderance that Mr. Kaho'ohalahala did not abandon his residence in Lahaina, Maui, Hawaii, and did not relocate his permanent residence to Lana'i City, Lana'i, Hawai'i.

DECISION

Based upon the foregoing findings of fact and conclusions of law, the Board sustains Mr. Dupree's appeal of the County Clerk's October 10, 2008, determination and the County Clerk's decision is hereby overruled. For purposes of this 2008 election, Mr. Kaho'ohalahala is a resident of Lahaina, Maui, Hawai'i.

In the event of an appeal of this decision, Mr. Kaho'ohalahala shall be allowed to vote "provided that the ballot is placed in a sealed envelope to be later counted or rejected in accordance with the ruling on appeal." See Haw. Rev. Stat. § 11-25(c).

Pursuant to Haw. Rev. Stat. § 11-51, as amended, and Haw. Admin. R. § 2-51-43(k), the Board hereby gives Appellees Roy T. Hiraga and Solomon P. Kaho'ohalahala notice that they have the right to appeal this decision to the Intermediate Court of Appeals of Hawaii within 10 days of service of this decision. A

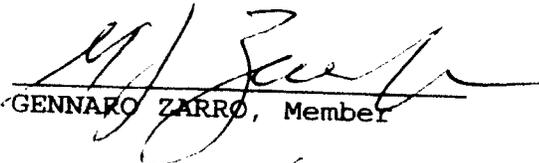
copy of Part IV of Haw. Rev. Stat. chapter 11, "Appeal from Board of Registration" is attached as Exhibit "A" hereto.

DATED: Wailuku, Maui, Hawai'i, At NOVEMBER 1, 2008.

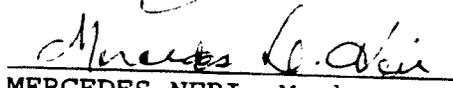
BOARD OF REGISTRATION for
the County of Maui



JOHN HENRY, Chairperson



GENNARO ZARRO, Member



MERCEDES NERI, Member

CERTIFICATION

I hereby certify that the foregoing document is a true and correct copy of the original on file at the Board of Registration.



Secretary of the Board
of Registration,
County of Maui

Michael P. Dupree vs. Roy T. Hiraga, Clerk of the County of Maui, and Solomon P. Kaho'chalahala; Case No. BCR 08-01; Findings of Fact, Conclusions of Law and Decision; Exhibit "A"

ELECTIONS, GENERALLY

11-53

(d) Reasonable notices of the sitting of the boards shall be given in their respective districts or counties. [am L 1998, c 2, §3; am L 2005, c 199, §1]

Note

Transfer of functions, etc L 2005, c 199, §2.

Revision Note

Only the subsections amended are compiled in this Supplement.

§11-42 Compensation. Members of the boards of registration shall be compensated pursuant to a schedule established by the chief election officer. The schedule shall be contained in rules adopted pursuant to chapter 91. [L 1970, c 26, pt of §2; am L 1979, c 133, §1; am L 1987, c 210, §1; am L 1998, c 56, §1]

PART IV. APPEAL FROM BOARD OF REGISTRATION

§11-51 Appeal from board. [2004 amendment repealed June 30, 2010. L 2006, c 94, §1.] Any affected person, political party, or any of the county clerks, may appeal to the intermediate appellate court, subject to chapter 602, in the manner provided for civil appeals from the circuit court; provided that the appeal is brought no later than 4:30 p.m. on the tenth day after the board serves its written decision, including findings of fact and conclusions of law, upon the appellant. This written decision of the board shall be a final appealable order. The board shall consider motions for reconsideration. Service upon the appellant shall be made personally or by registered mail, which shall be deemed complete upon deposit in the mails, postage prepaid, and addressed to the appellant's last known address. [L 1970, c 26, pt of §2; am L 1973, c 217, §1(o); am L 1979, c 111, §25; am L 1990, c 45, §9; am L 2004, c 202, §1]

Note

L 2004, c 202, §82 provides:
"SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

§11-52 Hearing; decision final. [2004 amendment repealed June 30, 2010. L 2006, c 94, §1.] When the appeal is perfected, the court shall hear the appeal as soon thereafter as may be reasonable. [L 1970, c 26, pt of §2; am L 2004, c 202, §2]

Note

L 2004, c 202, §82 provides:
"SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

§11-53 Decision, notice; action on. [2004 amendment repealed June 30, 2010. L 2006, c 94, §1.] Immediately upon rendering a final decision upon any appeal, the court shall notify the board of registration from which the appeal was taken; and if the decision reverses the decision of the board, the board shall immediately order the register to be corrected to conform with the decision. [L 1970, c 26, pt of §2; am L 2004, c 202, §3]

EXHIBIT "A"

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ELECTIONS

Note

L 2004, c 202, §82 provides:
 "SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

§11-54 Status pending appeal. [2004 amendment repealed June 30, 2010. L 2006, c 94, §1.] In case of an appeal from a decision of any board of registration the name of the person shall be placed or remain upon the register pending the decision of the appellate courts concerning the same. If the person so registered votes at any election before the appeal is decided and acted upon, the ballot of such voter shall be handled in accordance with section 11-25(c). [L 1970, c 26, pt of §2; am L 2004, c 202, §4]

Note

L 2004, c 202, §82 provides:
 "SECTION 82. Appeals pending in the supreme court as of the effective date of this Act [July 1, 2006] may be transferred to the intermediate appellate court or retained at the supreme court as the chief justice, in the chief justice's sole discretion, directs."

PART V. PARTIES

Case Notes

State's prohibition on write-in voting, as part of electoral scheme providing constitutionally sufficient ballot access, does not impose unconstitutional burden on voters' rights under First and Fourteenth Amendments. 504 U.S. 428.

§11-61 "Political party" defined. ***

- (b) Any party which does not meet the following requirements or the requirements set forth in sections 11-62 to 11-64, shall be subject to disqualification:
- (1) A party must have had candidates running for election at the last general election for any of the offices listed in paragraph (2) whose terms had expired. This does not include those offices which were vacant because the incumbent had died or resigned before the end of the incumbent's term; and
 - (2) The party received at least ten per cent of all votes cast:
 - (A) For any of the offices voted upon by all the voters in the State; or
 - (B) In at least fifty per cent of the congressional districts; or
 - (3) The party received at least four per cent of all the votes cast for all the offices of state senator statewide; or
 - (4) The party received at least four per cent of all the votes cast for all the offices of state representative statewide; or
 - (5) The party received at least two per cent of all the votes cast for all the offices of state senate and all the offices of state representative combined statewide. [am L 1997, c 287, §1; am L 1999, c 205, §1]

Revision Note

Only the subsection amended is compiled in this Supplement.

§11-62 Qualification of political parties; petition. (a) Any group of persons hereafter desiring to qualify as a political party for election ballot purposes in the State shall file with the chief election officer a petition as provided in this section. The petition for qualification as a political party shall: